Supreme Court, U.S.
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No. 92-1366

In The

Supreme Court of the United States

October Term, 1992

JOHN W. DECAMP,

Petitioner,

vs.

THE DOUGLAS COUNTY FRANKLIN GRAND JURY; MICHAEL FLANAGAN, FOREMAN IN HIS OFFICIAL AND INDIVIDUAL CAPACITY; JOHN DOES 1-15 INDIVIDUAL GRAND JURORS; GRAND JURY PROSECUTORS SAMUEL VAN PELT & TERRY C. DOUGHERTY, IN THEIR INDIVIDUAL CAPACITIES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Submitted by:

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QUESTION PRESENTED FOR REVIEW

Whether special prosecutors enjoy absolute immunity under 42 U.S.C. § 1983 for assisting in the drafting of a Grand Jury report permitted by Nebraska law?

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STATEMENT OF THE CASE

A. Facts

A Nebraska Grand Jury convened from March 19, 1990, to July 24, 1990, to investigate the failure of the Franklin Community Credit Union as well as charges of child abuse surrounding key figures in the credit union.

Previously, on or about January 18, 1990, John DeCamp, a Nebraska Lawyer, former state Senator and Petitioner herein, had written a memo to a reporter for the Omaha World-Herald newspaper concerning the Franklin Community Credit Union and allegedly the key figures in its failure. DeCamp claimed no first hand knowledge of the allegations contained in the memo. This memo was widely disseminated in the Omaha area and "played a major role in bringing about the formation of the grand jury." (App. 10). The Petitioner was never asked to appear before the Grand Jury.

The Grand Jury found no basis for prosecution. On July 25, 1990, the Grand Jury issued a report which was made available to the Omaha World-Herald. The Grand Jury's report contained the following statement:

> It is our opinion that DeCamp issued his memorandum for personal political gain and possible revenge for past actions alleged against him. From personal experience and the bitterness engendered from media attacks, an attorney of his stature should be more discrete.

DeCamp alleges that the publication of this statement was malicious, intentional, negligent, and done in reckless disregard for his personal and professional reputation and in violation of his constitutional and statutory

rights (Petitioner's Brief pp.24-25). DeCamp alleges the special prosecutors assisted the Grand Jury in "co-authoring" the Grand Jury's report.

B. Procedural History

DeCamp filed his complaint in the United States District Court for the District of Nebraska. Respondents made a motion to dismiss under Fed. R. Civ. P. Rule 12(b)(6). The District Court granted this motion finding that the Grand Jury and Special Prosecutors were entitled to absolute immunity.

On appeal to the Eighth Circuit Court of Appeals, the decision of the District Court was affirmed. *DeCamp v. Douglas County Franklin Grand Jury*, 978 F.2d 1047 (8th Cir. 1992). DeCamp has petitioned for a Writ of Certiorari from that decision.

ARGUMENT

It is well settled that special prosecutors enjoy absolute immunity for their acts that are "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S.Ct. 984, 995, 47 L.Ed.2d 128 (1976); *Burns v. Reed*, ___ U.S. ___, 111 S.Ct. 1934 (1991). Thus, "[t]here is wide-spread agreement among the courts of appeals that prosecutors are absolutely immune from liability under § 1983 for their conduct before grand juries." *Burns*, ___ U.S. at ___ n.6, 111 S.Ct. at 1941 n.6 (citations omitted). This immunity was extended here to prosecutors who, while acting as the

grand jury's legal advisor, help the grand jury perform its quasi-judicial responsibilities. *DeCamp*, 978 F.2d at 1053.

Under Nebraska law, special prosecutors are specifically authorized to serve as legal advisors to a grand jury. Neb. Rev. Stat. § 29-1408 (1989) states in pertinent part:

> The county attorney or the assistant county attorney shall be allowed at all times to appear before the grand jury for the purposes of *giving information relative to any matter cognizable by such jury or giving such jury advice upon any legal matter the jury may require* . . . (emphasis added).

Neb. Rev. Stat. § 23-1208 (1987) states in pertinent part:

> Whenever the county attorney is required by the grand jury of any court sitting in his county, it shall be his duty to attend for the purpose of examining witnesses in their presence, or *of giving them advice in any legal matter* . . . (emphasis added).

Pursuant to Neb. Rev. Stat. § 29-1401 (1989) grand juries are authorized to issue reports. The statute says: "any grand jury called pursuant to this section shall be limited in its charge, powers, duties, proceedings, indictment, and report to the review of the incident or incidents which caused it to be called." Neb. Rev. Stat. § 29-1401 (1989).

The petitioner has admitted his memo "played a major role in bringing about the formation of the grand jury." Therefore the memo was clearly a part of the "incident" which caused the Grand Jury to be called. The Grand Jury clearly has legal authority to issue a report

regarding this "incident." Furthermore, a special prosecutor, under Nebraska law as previously set forth, undoubtedly has the authority to provide advice to a grand jury.

Under this court's previous holdings in *Imbler* and *Burns*, and as provided by Nebraska law, the special prosecutors were clearly acting within the scope of their state's statutory authority and acted in the midst of an activity "intimately associated with the judicial phase of the criminal process." Thus, they should be entitled to absolute immunity against liability under § 1983.

CONCLUSION

For the foregoing reasons the Respondent requests this petition for Writ of Certiorari be denied.

Respectfully submitted,

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